



STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION

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Executive Director

September 13, 2006

Dear Interested Party:

Enclosed is the *Initial Discussion Paper* regarding the proposed regulations for the Cigarette and Tobacco Products Licensing Act of 2003. Discussion regarding the proposed regulations is scheduled for the Board's **November 20, 2006, Business Taxes Committee** meeting.

However, before the issue is presented at the Business Taxes Committee meeting, staff would like to provide interested parties an opportunity to discuss the issue and present any suggested changes or comments. Accordingly, a meeting is scheduled in **Room 122 at 10:00 a.m. on September 20, 2006**, at the Board of Equalization, 450 N Street, Sacramento, California.

If you are unable to attend the meeting but would like to provide input for discussion at the meeting, please feel free to write to me at the above address or send a fax to (916) 323-8765 before the September 20 meeting. If you are aware of other persons that may be interested in attending the meeting or presenting their comments, please feel free to provide them with a copy of the enclosed material and extend an invitation to the meeting. If you plan to attend the meeting on September 20, or would like to participate via teleconference, I would appreciate it if you would let staff know by contacting Ms. Marjorie Espanol-Johnson at (916) 324-8487 or by e-mail at btcinformationrequests@boe.ca.gov by September 18, 2006. This will allow staff to make alternative arrangements should the expected attendance exceed the maximum capacity of Room 122 and to arrange for teleconferencing. In addition, please let Ms. Espanol-Johnson know if you wish to have future correspondence, including the second discussion paper and all attachments, sent to your e-mail address rather than to your mailing address.

Whether or not you are able to attend the above interested parties meeting, please keep in mind that the due date for interested parties to provide written responses to staff's analysis is **September 27, 2006**. Please be aware that a copy of the material you submit may be provided to other interested parties. Therefore, please ensure your comments do not contain confidential information.

If you are interested in other topics to be considered by the Business Taxes Committee, you may refer to the "Business Taxes Committee" page on the Board's Internet website (<http://www.boe.ca.gov/meetings/btcommittee.htm>) for copies of Committee discussion or issue papers, minutes, a procedures manual, and calendars arranged according to subject matter and by month.

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Thank you for your consideration. I look forward to your comments and suggestions. Should you have any questions, please feel free to contact Ms. Leila Khabbaz, Supervisor, Business Taxes Committee Team at (916) 322-5271.

Sincerely,

David J. Gau
Deputy Director
Property and Special Taxes Department

DJG:me

Enclosures

cc: (all with enclosures)
Honorable John Chiang, Chair
Honorable Claude Parrish, Vice Chairman
Ms. Betty T. Yee, Acting Member, First District (MIC 71)
Honorable Bill Leonard, Member, Second District (MIC 78)
Honorable Steve Westly, State Controller, C/O Ms. Marcy Jo Mandel (MIC 73)
Mr. Chris Schutz, Board Member's Office, Fourth District (MIC 72)
Mr. Neil Shah, Board Member's Office, Third District (via e-mail)
Mr. Romeo Vinzon, Board Member's Office, Third District (via e-mail)
Mr. Alan LoFaso, Board Member's Office, First District (via e-mail)
Ms. Mira Tonis, Board Member's Office, First District (via e-mail)
Mr. Steve Kamp, Board Member's Office, First District (MIC 71 and via e-mail)
Ms. Margaret Pennington, Board Member's Office, Second District (via e-mail)
Mr. Tom Hudson, Board Member's Office, Second District (MIC 78 and via e-mail)
Mr. Ramon J. Hirsig (MIC 73)
Ms. Kristine Cazadd (MIC 83)
Ms. Randie L. Henry (MIC 43)
Ms. Lynn Bartolo (MIC 56)
Mr. Gil Haas, Jr. (MIC 42)
Mr. Robert Lambert (MIC 82)
Mr. Randy Ferris (MIC 82)
Ms. Monica Brisbane (MIC 82)
Mr. Mark Edwards (MIC 42)
Ms. Leila Khabbaz (MIC 50)

INITIAL DISCUSSION PAPER

Proposed Regulations Cigarette and Tobacco Products Licensing Act of 2003

Issue

Should the Board adopt proposed regulations 45000 through 47030 to clarify the application of the Cigarette and Tobacco Products Licensing Act of 2003?

Background

To address the problem of untaxed distributions and illegal sales of cigarettes and tobacco products in California, Assembly Bill 71 [Sec. 21. of stats 2003, Ch. 890 (AB 71)] enacted the Cigarette and Tobacco Products Licensing Act of 2003 (hereafter the Act). The Act imposes licensing and various other requirements on all retailers, wholesalers, and distributors of cigarettes and tobacco products, and all manufacturers and importers of cigarettes.

Any violation of the Act may result in either a criminal or civil citation. The Act authorizes the Board to impose civil penalties (suspensions or revocations of a license and/or fines) for violations of the Act. With few exceptions, the civil penalties provided in the Act are not mandatory and, therefore, the Board has discretion in determining the civil penalties to be imposed.

The Investigations Division and the Excise Taxes and Fees Division (Excise Division) are responsible for implementing the provisions of the Act. The Investigations Division conducts field inspections, seizes unstamped cigarettes or untaxed tobacco products, and, if applicable, issues civil or criminal citations for violations of the Act or the Revenue and Taxation Code. The Excise Division is responsible for the issuance, denial, and transfer of licenses, the issuance of warning notices and violation notices, the assessment and collection of fines and penalties, and conducting initial appeals conferences.

Statutory Authority

In addition to any other civil or criminal penalty, Business and Professions Code (hereafter BPC) sections 22974.7, 22978.7, and 22979.7 provide that upon a finding that there has been a violation of any provision of the Act, the Board may take the following actions:

- First offenses - The Board may revoke or suspend the license or licenses of the person pursuant to the procedures applicable to the revocation of a license set forth in Section 30148 of the Revenue and Taxation Code (hereafter RTC); and
- Second or any subsequent offense - In addition to suspension or revocation, the Board may impose a civil penalty in an amount not to exceed the greater of either of the following:

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Proposed Regulations Cigarette and Tobacco Products Licensing Act of 2003

- Five times the retail value of the seized cigarettes or tobacco products;¹ or
- Five thousand dollars (\$5,000).

BPC section 22980.3, subdivision (a), further provides that, in addition to any applicable fines or penalties for a violation, licenses issued under the Act shall be subject to suspension or revocation for violations of the provisions of the Act or the RTC as follows:

- First conviction - A licensee shall receive a written notice from the Board detailing the suspension and revocation provisions of the Act (at its discretion, the Board may also suspend a license for up to 30 days); and
- Second conviction - Within four years of a previous violation, the license shall be revoked.

BPC section 22971.2 authorizes the Board to prescribe, adopt, and enforce rules and regulations relating to the administration and enforcement of the Act.

Prior Board Approval

At the November 4, 2004, Board meeting, a proposal titled “Civil Penalties and Appeals Procedures for Violations of AB 71” (<http://www.boe.ca.gov/meetings/pdf/ItemP3110404.pdf>) was brought before the Board by staff to: (1) adopt a fine schedule and appeal process, and (2) delegate the authority to staff to hear appeals of fines and penalties through the suspension process. Staff also made a “Request for Delegation of Authority” to hold and decide license suspension hearings. The Board unanimously approved the “Civil Penalties and Appeals Procedures for Violations of AB 71” (with modifications) and the “Request for Delegation of Authority.” The modifications included lowering the threshold for fines appealable to the Board to amounts above \$2,500 and to allow suspensions to be appealable to the Legal Department’s Appeals Division.

At the May 25, 2005, Board meeting, staff requested further clarification of the administrative appeals process as discussed in the “Civil Penalties and Appeals Procedures for Violation of AB 71” proposal through a document titled “Request for Further Direction Regarding the Procedures for Resolving Appeals under AB 71” (<http://www.boe.ca.gov/meetings/pdf/ItemM10525052.pdf>). The requested clarification pertained

¹ For manufacturers and importers, the penalty under the applicable provision applies only to seized cigarettes or tobacco products defined as “cigarettes” under the Act.

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to citations that may be brought for hearing before the Board.² Leading to this request staff set forth its understanding of the appeals process as follows:

- First - When a penalty had been imposed, the licensee or unlicensed person had the right to a conference with the Excise Division.
- Second - The licensee or unlicensed person could appeal the decision to the Appeals Division, which would hold a conference and issue a decision.
- Third - For less serious cases involving suspensions and fines up to \$2,500, the decision of the Appeals Division would be final, and there were no further administrative appeal rights.
- Fourth - For cases involving revocations and fines over \$2,500, the licensee or unlicensed person could also request a hearing before the Board.

The Board concurred with staff's understanding.

Under the guidelines approved by the Board, an automatic 30-day suspension was to be imposed for a violation of BPC section 22974.3, for possession of unstamped cigarette packages. Based on several months of appeals, staff found mitigating circumstances that could warrant a lesser period of suspension in many instances. Accordingly at the October 25, 2005, Board meeting, through a document titled "Proposed Clarification of Penalties and Request to Draft Regulations" (<http://www.boe.ca.gov/meetings/pdf/ItemM1AB-71Issues-ClrfctionofPen.pdf>), staff requested: (1) delegation from the Board to allow the staff discretion to be flexible in imposing 0-to-30-day suspensions for violations of BPC section 22974.3, involving sale or possession of unstamped cigarette packages; and (2) authorization for staff to draft proposed regulations setting forth the appeals procedures to be followed and penalties to be imposed in implementing the Act. The Board unanimously adopted staff's recommendation.

At the June 27, 2006, Board meeting, staff provided a first draft of proposed regulations for concept approval, with the understanding that further refinement, after input from interested parties, would be necessary before formal rulemaking commenced. The Board granted concept approval, and the matter was referred to the Business Tax Committee to start the interested parties process.

² This did not include mandatory revocations under BPC section 22974.4 (i.e., revocations for conviction of a felony under RTC section 30473 or 30480 or for having any permit or license revoked under any provision of the RTC).

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Proposed Regulations Cigarette and Tobacco Products Licensing Act of 2003

Discussion – Proposed Regulations

The proposed regulations are divided into six articles as follows:

Article 1 provides additional definitions for items not defined under BPC section 22971 (Regulation 45000) and also discusses the contents and service of a civil or criminal citation (Regulation 45010).

Article 2 discusses (1) when a new license should not be issued to an applicant (Regulation 45020), (2) what conditions may allow a license to be issued for a business subject to a criminal or civil citation (Regulation 45030), (3) how to determine if the sale or transfer of a business is an arm's length transaction (Regulation 45040), (4) the presumption that a transfer or sale between related parties is not at arm's length (Regulation 45050), (5) examples of items that may indicate a sale or transfer was not an arm's length transfer (Regulation 45060), (6) examples of information that may be provided to the Excise Division to establish that a transfer or sale of a business with a suspended or revoked license, or subject to a civil or criminal citation, is at arm's length (Regulation 45070), (7) appeals rights when a new license is denied (Regulation 45080), and (8) further violations that may arise when the Excise Division determines that a transfer or sale of a business was not at arm's length (Regulation 45090).

Article 3 discusses Notices of Violation and Warning Notices, setting forth the procedures for delivering appropriate notice to the cited person (Regulations 46000 and 46010) and providing that, if an appeal is not filed, the penalty or penalties stated in the Notice of Violation or Warning Notice shall become final (Regulation 46020).

Article 4 describes the various penalties applicable for violating the Act for licensed or unlicensed: (1) Retailers (Regulation 46030), (2) Wholesalers and Distributors (Regulation 46040), and (3) Manufacturers and Importers (Regulation 46050). This article also sets forth examples of mitigating circumstances that may result in a reduction of a stated suspension period (Regulation 46060) and describes how the amount of a fine is determined (Regulation 46070) and collected (Regulation 46080).

Article 5 describes the right of every licensee or unlicensed person to file an appeal to a Notice of Violation or a Warning Notice (Regulation 46090). This article further sets forth: (1) how to request an appeal with the Excise Division and the procedures governing such an appeal (Regulation 47000); (2), how to appeal a decision of the Excise Division to the Appeals Division, the procedures governing such an appeal and when a decision by the Appeals Division is appealable to the Board (Regulation 47010); and (3) when applicable, the procedures governing a Board Hearing (Regulation 47020).

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Article 6 explains that cigarettes or tobacco products seized under certain statutes are forfeited to the state unless a timely petition for release of the seized property is filed and the Board finds that such cigarettes or tobacco products were erroneously or illegally seized (Regulation 47030).

To view the current draft of the staff-proposed regulations for the Act, please go to the Board's Web site at <http://www.boe.ca.gov/meetings/btc2006.htm>.

The main concepts underlying the proposed regulations are:

- a. The proposed regulations authorize staff to deny a new license to an applicant: (1) for a location where a violation and appeal are already pending; (2) when the existing license at the location is presently suspended; (3) for a location where any license has been revoked within the preceding five years; or (4) where an owner or person controlling the owner or the business has been convicted of a felony. Nevertheless, the regulations permit staff to issue a license in the case of a license applicant for a location where a violation and appeal are already pending if the applicant is purchasing the business in an arm's length transaction.
- b. When a violation or violations of the Act have occurred at a licensed location and a sale or transfer of that licensed business between related parties is proposed, there will be a presumption that the transaction is not at arm's length.
- c. An appeal procedure is outlined for license applicants who have been denied the issuance of a license, with a final administrative appeal step of an oral hearing before the Board.
- d. The penalties for violations of the Act are set forth in detail and, in cases in which the statutes give the Board discretion, provision is made for less severe suspension or revocation penalties when there are specified mitigating circumstances. Under appropriate circumstances, provision is made for warning notices, for 10-day suspensions, 20-day suspensions, 30-day suspensions, and revocations, and for fines in varying amounts.³
 - (1) The proposed regulations set specific suspension periods based on the amount of unstamped cigarettes or tobacco products seized, i.e., less than 20 packages, or 20 packages or more. The specified suspension period may be reduced based on mitigating circumstances.

³ The Board gave concept approval to this change in current practice at its June 27, 2006, meeting.

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- (2) For untaxed tobacco products, the proposed regulations would impose penalties equivalent to those being proposed for unstamped cigarettes.
- e. Two separate appellate paths for penalties are provided for:
 - (1) In the case of a notice of revocation or fine of more than \$2,500, after issuance of a citation, the staff first serves a Notice of Violation; if the licensee or unlicensed person files a timely appeal, then an initial conference with the Excise Division is scheduled. If the licensee or unlicensed person does not file a timely appeal, however, then the revocation or fine is final, with no other action by the Board. If the Excise Division rules against the licensee or unlicensed person and the licensee or unlicensed person files a timely appeal, then the Appeals Division will schedule a conference. If the Appeals Division does not issue a decision that is satisfactory to the licensee or unlicensed person, then the licensee or unlicensed person may file a timely appeal to the Board for an oral hearing.
 - (2) In the case of lesser penalties or fines, the same process applies, however the Appeals Division conference is the final administrative review. In these cases, no appeal to the Board is permitted.
- f. Finally, in the case of seized cigarettes or tobacco products, reference is made to the statutory forfeiture provisions in the BPC and the statutory administrative appellate procedures set forth in the RTC.

Summary

Under discussion are proposed regulations for the Cigarette and Tobacco Products Licensing Act of 2003. Interested parties are welcome to submit comments or suggestions on this issue and are invited to participate in the interested parties meeting scheduled for September 20, 2006, in Sacramento.

Prepared by the Investigations Division, Legal Department

Current as of September 8, 2006

****DRAFT****
****FOR DISCUSSION PURPOSES ONLY****

CIGARETTE AND TOBACCO PRODUCTS LICENSING ACT REGULATIONS
(Division 8.6 of the BUSINESS AND PROFESSIONS CODE Sections 22970-22995)

Title 18. Public Revenues

Division 2. State Board of Equalization – Business Taxes, Fees, and Licenses

CHAPTER 9.5 CIGARETTE AND TOBACCO PRODUCTS LICENSING ACT OF 2003

Article 1: DEFINITIONS AND CITATIONS

Regulation 45000. DEFINITIONS.

In addition to the definitions in Business and Professions Code section 22971, the following definitions shall apply to this chapter:

- (a) “Act” means the Cigarette and Tobacco Products Licensing Act of 2003, set forth in division 8.6 of the Business and Professions Code.
- (b) “Appeals Division staff” means an employee or employees of the State Board of Equalization assigned to the Appeals Division of the Legal Department.
- (c) “Applicant” means a retailer, wholesaler, distributor, importer or manufacturer who has applied for a license pursuant to the Act, and, if the retailer, wholesaler, distributor, importer or manufacturer is not an individual, the term includes any person controlling such entity.
- (d) “Arm’s length transaction” means a sale in good faith and for valuable consideration that reflects the fair market value in the open market between two informed and willing parties, neither under any compulsion to participate in the transaction.
- (e) “Board” means the Board Members of the State Board of Equalization meeting as a body or the agency created by article XIII, section 9, of the California Constitution, as the context indicates.
- (f) “Board Proceedings Division staff” means an employee or employees of the State Board of Equalization assigned to the Board Proceedings Division of the Legal Department.
- (g) “Business” means a business operated by a licensee and/or the property upon which or location at which such licensed business is operated.

- (h) "Citation" means a civil notice of violation(s) or a criminal misdemeanor notice to appear.
- (i) "Control" or "controlling" means control or controlling as defined in Business and Professions Code section 22971, subdivision (p).
- (j) "Conviction" means a judgment of guilt of a criminal offense.
- (k) "Excise Taxes and Fees Division staff" means an employee or employees of the State Board of Equalization assigned to the Excise Taxes and Fees Division of the Property and Special Taxes Department.
- (l) "Finding" or "Findings" means a determination that a violation of the Act has occurred. This can occur by default if no appeal is made from a Notice of Violation or Warning Notice, or by a final decision made pursuant to Regulations 47000, 47010, or 47020.
- (m) "Fine" means any fine imposed by the Board pursuant to the Act.
- (n) "Investigations Division staff" means an employee or employees of the State Board of Equalization assigned to the Investigations Division of the Legal Department.
- (o) "Licensee" means a licensee as defined in Business and Professions Code section 22971, subdivision (j).
- (p) "License subject to a civil or criminal citation" means a license as to which a citation has been issued but no final determination of violation has yet been entered into the licensee's or unlicensed person's permanent record.
- (q) "Notice of Violation" means the document sent to a licensee or unlicensed person referring to the citation issued, the charged violation(s), the penalty or penalties to be imposed, and the licensee's or unlicensed person's appeal rights.
- (r) "Offense" means a criminal conviction of violations of the Act and/or civil findings of violations of the Act.
- (s) "Person" means a person as defined in Business and Professions Code section 22971, subdivision (n).
- (t) "Regulation" means a section of title 18 of the California Code of Regulations.
- (u) "Unlicensed Person" means any person not holding a valid license issued by the Board pursuant to the Act.

- (v) “Warning Notice” means the document advising a licensee or unlicensed person that the stated violation(s) of the Act will be entered into the licensee’s or unlicensed person’s permanent record as a first offense and that future violations will result in civil penalties.

Note: Authority: Business and Professions Code section 22971.2.

Reference: Business and Professions Code sections 22970, 22971, 22974.5, 22978.7, 22979.7.

Regulation 45010. CITATIONS.

(a) Issuance of a Civil or Criminal Citation.

The Investigations Division may issue a citation to a licensee or unlicensed person if the licensee or unlicensed person is determined to be in violation of any provision of the Act.

(b) Contents and Service of a Civil Citation.

The citation shall be in writing and shall describe the nature and facts of the violation, including a reference to the statute(s) violated. The citation shall state that the Board will mail a notice regarding the citation and information about any penalties, if applicable, and appeal rights. The citation shall be placed in a sealed envelope, with postage paid, addressed to the owner of record at the owner’s last known address as it appears in the records of the Board. The giving of notice shall be deemed complete at the time of deposit of the notice at a United States Post Office, mailbox, sub-post office, substation, mail chute, or other facility regularly maintained or provided by the United States Postal Service, without extension of time for any reason. In lieu of mailing, notice may be served personally by delivery to the person to be served and service shall be deemed complete at the time of such delivery. Personal delivery to a corporation may be made by delivery of a notice to any person designated to be served for the corporation with summons and complaint in a civil action, pursuant to the Code of Civil Procedure.

(c) Contents and Service of a Criminal Citation.

A criminal citation shall state the appearance date and the appropriate jurisdiction. The citation shall be served in accordance with Penal Code section 853.6.

Note: Authority: Business and Professions Code section 22971.2.

Reference: Business and Professions Code sections 22973, subdivision (a)(5), 22974, 22974.3, 22974.4, 22974.5, 22974.7, 22974.8, 22978.1, 22978.2, 22978.4, 22978.5, 22978.6, 22978.7, 22979, 22979.4, 22979.5, 22979.6, 22979.7, 22980, 22980.1, 22980.2, 22980.3, 22981; Penal Code section 853.6.

Article 2: LICENSES – ISSUANCE, TRANSFER AND DENIAL

Regulation 45020. DENIAL OF LICENSE.

A new license shall not be issued to an applicant when any of the following apply: (1) a license subject to civil or criminal citation has been issued for the same location; (2) a license for the same location is suspended; (3) a license for the same location has been revoked any time within the preceding five years; or (4) any person controlling the applicant has been convicted of a felony pursuant to Revenue and Taxation Code section 30473 or 30480.

Note: Authority: Business and Professions Code section 22971.2.

Reference: Business and Professions Code sections 22973.1, 22977.2, 22979.

Regulation 45030. ISSUANCE OF LICENSE - TRANSFER OF BUSINESS.

Notwithstanding the provisions of Regulation 45020 and if all other statutory requirements are met, a new license will be issued for a business with a license subject to a civil or criminal citation, if the applicant acquired the business pursuant to an arm's length transaction after the violations contained in the citation were committed.

Note: Authority: Business and Professions Code section 22971.2.

Reference: Business and Professions Code sections 22973.1, 22977.2, 22979.

Regulation 45040. DETERMINATION OF ARM'S LENGTH TRANSACTION.

The Excise Taxes and Fees Division shall determine whether the transfer of a business was pursuant to an arm's length transaction, utilizing the criteria set forth in Regulations 45050 and 45060.

Note: Authority: Business and Professions Code section 22971.2.

Reference: Business and Professions Code sections 22973.1, 22977.2, 22979.

Regulation 45050. TRANSFERS OR SALES BETWEEN RELATED PARTIES.

- (a) **Presumption – Not Arm's Length.** When a violation or violations of the Act have occurred at a licensed location, the sale of the business between and among relatives (by blood or marriage, which relationships include, but are

not limited to, spouses, parents, children and siblings), a partnership and its partners, a limited liability company or association and its members, a corporation and its shareholders, and persons and entities under their control, is presumed to be a sale for the primary purpose of avoiding the effects of violations of the Act and not at arm's length.

- (b) This presumption may be rebutted only by clear and convincing evidence to the contrary.
- (c) The purchaser has the burden of proving that the transaction was an arm's length transaction.

Note: Authority: Business and Professions Code section 22971.2.

Reference: Business and Professions Code sections 22973.1, 22977.2, 22979.

Regulation 45060. EVIDENCE OF A NON-ARM'S LENGTH TRANSACTION.

Evidence that a sale is a non-arm's length transaction, includes, but is not limited to, the following:

- (a) Inadequate consideration was paid for the assets of the prior licensee (former owner).
- (b) No bill of sale, sales contract or escrow account was prepared or executed for the sale of the business.
- (c) The former owner holds a significant equity interest in the inventory of products for sale, fixtures or equipment.
- (d) The purchaser was or is an employee, co-owner or independent contractor with the former owner.
- (e) The ownership of the real property at which the business is located, or a master leasehold interest therein, remains with the former owner, with no lease, sublease or lease assignment having been executed with the purchaser providing for the payment of reasonable rentals, subrentals, or other consideration to the former owner.
- (f) The business license for the business remains in the name of the former owner.
- (g) The purchaser holds itself out as being the same business as that operated by the former owner or as being affiliated with the former owner in the business; and the former owner:

- (1) Is present at the business on a regular basis;

- (2) Continues to contract with suppliers to purchase products for use at the business;
- (3) Assumes personal liability for services, supplies or inventory for the business;
- (4) Continues to sign checks on one or more of the business's bank accounts; or
- (5) Maintains the authority to hire and fire business employees.

Note: Authority: Business and Professions Code section 22971.2.

Reference: Business and Professions Code sections 22973.1, 22977.2, 22979.

Regulation 45070. REQUEST FOR INFORMATION AND RECORDS.

When a business's license is suspended, revoked, or is subject to civil or criminal citation, then the parties to a proposed or completed transfer or sale of the business must, at the Board's request, provide all relevant information on the transfer or sale to the Excise Taxes and Fees Division, including, but not limited to, the purchase agreement, all escrow documents and proof of payment or tender of the purchase consideration.

Note: Authority: Business and Professions Code section 22971.2.

Reference: Business and Professions Code sections 22973.1, 22977.2, 22979.

Regulation 45080. APPEAL – DENIAL OF LICENSE.

- (a) If the Excise Taxes and Fees Division determines that a new license should not be issued pursuant to Regulation 45030, then it shall notify the applicant of such determination and deny the application for issuance of a new license for the applicant's business. The applicant may petition for a redetermination within 30 days from the date notice of the denial is mailed or personally delivered to the applicant. The denial of the application shall become final if a petition for redetermination is not filed before the expiration of the 30-day period.
- (b) Every petition for redetermination shall be in writing and shall state the specific grounds upon which the petition is founded.
- (c) The Board shall reconsider the determination of the Excise Taxes and Fees Division pursuant to its administrative appeals process set forth in Regulation 5023 [NOTE: reference to change when new Rules of Practice are adopted] and shall grant the applicant an oral hearing if timely requested within 30 days of the date the Decision and Recommendation issued by the Appeals Division is mailed to the applicant. Any Board hearing will be governed by the rules set forth in Regulations 5070, 5072 through 5075, 5076, 5077 through 5082,

and 5083 through 5087 [NOTE: reference to change when new Rules of Practice are adopted].

- (d) The order or decision of the Board upon a petition for redetermination becomes final 30 days after the date notice thereof is mailed to the applicant, except as provided in Regulation 5082 [NOTE: reference to change when new Rules of Practice are adopted].
- (e) Any notice required by this section shall be placed in a sealed envelope, with postage paid, addressed to the applicant at the applicant's last known address as it appears in the records of the Board. The giving of notice shall be deemed complete at the time of deposit of the notice at a United States Post Office, mailbox, sub-post office, substation, mail chute, or other facility regularly maintained or provided by the United States Postal Service, without extension of time for any reason. In lieu of mailing, notice may be served personally by delivery to the person to be served and service shall be deemed complete at the time of such delivery. Personal delivery to a corporation may be made by delivery of a notice to any person designated to be served for the corporation with summons and complaint in a civil action, pursuant to the Code of Civil Procedure.

Note: Authority: Business and Professions Code section 22971.2.

Reference: Business and Professions Code sections 22973.1, 22977.2, 22979.

Regulation 45090. NON-ARM'S LENGTH TRANSFER - SALES.

The Excise Taxes and Fees Division's determination that a licensee's transfer of a business with a suspended or revoked license was not at arm's length may establish grounds for an additional violation of the Act. The Investigations Division may issue a citation for a violation of Business and Professions Code section 22980.2, subdivision (c), if the business is found selling cigarettes or tobacco products.

Note: Authority: Business and Professions Code section 22971.2.

Reference: Business and Professions Code sections 22973.1, 22977.2, 22979, 22980.2.

Article 3: NOTICES OF VIOLATION OR WARNING NOTICES

Regulation 46000. ISSUANCE AND CONTENTS OF A NOTICE OF VIOLATION OR WARNING NOTICE.

The Investigations Division shall forward a copy of a citation issued to a licensee or unlicensed person to the Excise Taxes and Fees Division, which shall prepare

and mail a Notice of Violation or Warning Notice to the cited licensee or unlicensed person.

Note: Authority: Business and Professions Code section 22971.2.

Reference: Business and Professions Code sections 22974.7, 22978.7, 22979.7.

Regulation 46010. SERVICE OF A NOTICE OF VIOLATION OR WARNING NOTICE.

The Notice of Violation or Warning Notice shall be placed in a sealed envelope, with postage paid, addressed to the licensee or unlicensed person at his or her last known address as it appears in the records of the Board. The giving of notice shall be deemed complete at the time of deposit of the notice at a United States Post Office, a mailbox, sub-post office, substation, mail chute, or other facility regularly maintained or provided by the United States Postal Service, without extension of time for any reason. In lieu of mailing, a Notice of Violation may be served personally by delivery to the person to be served and service shall be deemed complete at the time of such delivery. Personal delivery to a corporation may be made by delivery of a notice to any person designated to be served for the corporation with summons and complaint in a civil action, pursuant to the Code of Civil Procedure.

Note: Authority: Business and Professions Code section 22971.2.

Reference: Business and Professions Code sections 22974.7, 22978.7, 22979.7.

Regulation 46020. FINALITY.

The penalty or penalties stated in the Notice of Violation or Warning Notice shall become final as provided in Regulations 47000 and 47010, unless an appeal is filed with the Board within the applicable time periods provided therein.

Note: Authority: Business and Professions Code section 22971.2.

Reference: Business and Professions Code sections 22974.7, 22974.8, 22979.7.

Article 4: PENALTIES AND FINES

Regulation 46030. PENALTIES FOR LICENSED OR UNLICENSED RETAILERS.

The following penalties shall be assessed in addition to any other civil or criminal penalty provided by law upon a finding that a retailer has violated any provision of the Act:

(a) A first offense of a violation of any of the following provisions shall result in the issuance of a Warning Notice to the licensee or unlicensed person:

- (1) Business and Professions Code section 22974 (retailer's failure to retain purchase invoices).
- (2) Business and Professions Code section 22980.1, subdivision (c), (d) or (e) (purchase from unlicensed person or person with suspended or revoked license).
- (3) Business and Professions Code section 22980.1, subdivision (g) (purchase of cigarettes to which a stamp may not be affixed in accordance with Rev. & Tax. Code, § 30163, subd. (b)).
- (4) Business and Professions Code section 22980.2, subdivision (a) (sales of cigarettes or tobacco products by an unlicensed person or person with suspended or revoked license).

(b) A first offense of a violation of any of the following provisions shall result in the issuance of a 20-day suspension:

- (1) Business and Professions Code section 22973, subdivision (a)(5) (retailer's false statement on application).
- (2) Business and Professions Code section 22980, subdivision (b) (any person's refusal to allow inspection).

(c) A second or subsequent offense for a violation of the provisions listed in subdivision (a) or (b) above, shall result in both a 30-day suspension or revocation and a fine. The fine shall be determined in accordance with Regulation 46070.

(d) A violation of Business and Profession Code section 22974.3 (possession of unstamped cigarettes or untaxed tobacco products) shall result in the following:

- (1) Notwithstanding paragraphs (2) and (3) below, a Warning Notice for a first offense when the licensee has been in business for less than one month and there has been no purchase of new cigarette or tobacco product inventory during that period.
- (2) A 10-day suspension for a first offense for a seizure of less than 20 packages of cigarettes, or the equivalent amount of tobacco products based on wholesale cost.

- (3) A 20-day suspension for a first offense for a seizure of 20 packages of cigarettes or more, or the equivalent amount of tobacco products based on wholesale cost.
- (4) Both a 30-day suspension or revocation and a fine for a second or subsequent offense. The fine shall be determined in accordance with Regulation 46070.
- (e) In cases involving multiple violations, the violation punishable by the most severe penalty will be used for purposes of determining the penalty assessed.
- (f) Notwithstanding subdivisions (b) through (e) above, a reduction in the length of a suspension period may be warranted if mitigating circumstances are present, as set forth in Regulation 46060. If a suspension period is reduced, the redetermined period of suspension shall be 0 days, 10 days, or 20 days. The existence of mitigating circumstances may also warrant reducing a revocation penalty to a 30-day suspension, unless revocation is mandated pursuant to Business and Professions Code section 22974.4, 22978.6, or 22980.3, subdivision (a)(2).

Note: Authority: Business and Professions Code section 22971.2.

Reference: Business and Professions Code sections 22973, subdivision (a)(5), 22974, 22974.3, 22974.4, 22974.7, 22980.1, subdivisions (c), (d), (e), (g), 22980, subdivision (b), 22980.2, subdivision (a), 22980.3, subdivision (a)(2).

Regulation 46040. PENALTIES FOR LICENSED OR UNLICENSED WHOLESALEERS AND DISTRIBUTORS.

The following penalties shall be assessed in addition to any other civil or criminal penalty provided by law upon a finding that a wholesaler or distributor has violated any provision of the Act:

- (a) A first offense of a violation of any of the following provisions will result in the issuance of a Warning Notice to the licensee or unlicensed person:
 - (1) Business and Professions Code section 22978.1 (distributor's or wholesaler's failure to retain purchase invoices).
 - (2) Business and Professions Code section 22978.4, subdivision (c) (distributor's or wholesaler's failure to comply with invoice requirements).
 - (3) Business and Professions Code section 22978.5, subdivision (b) (distributor's or wholesaler's failure to retain sales records).

- (4) Business and Professions Code section 22980.1, subdivision (b), (c), (d), (e) (sales to or purchases from unlicensed person or person with suspended or revoked license) or (f) (sales of cigarettes or tobacco products to retailer or wholesaler revoked or suspended until debts are clear).
 - (5) Business and Professions Code section 22980.2, subdivision (a) (sales of cigarettes or tobacco products by unlicensed person or person with suspended or revoked license).
- (b) A first offense of a violation of any of the following provisions will result in the issuance of a 20-day suspension:
- (1) Business and Professions Code section 22977, subdivision (a)(5) (distributor's or wholesaler's false statement on application).
 - (2) Business and Professions Code section 22980, subdivision (b) (any person's refusal to allow inspection).
 - (3) Business and Professions Code section 22980.1, subdivision (g) (purchase of cigarettes to which a stamp may not be affixed in accordance with Rev. & Tax. Code, § 30163, subd. (b)).
- (c) A second or subsequent offense for a violation of the provisions listed in subdivision (a) or (b) above shall result in both a 30-day suspension or revocation, and a fine. The fine shall be determined in accordance with Regulation 46070.
- (d) A violation of Business and Profession Code section 22978.2 (possession of counterfeit stamped cigarettes by distributors, unstamped cigarettes by wholesalers or untaxed tobacco products) shall result in the following:
- (1) Notwithstanding paragraphs (2) and (3) below, a Warning Notice for a first offense when the licensee or unlicensed person has been in business for less than one month and there has been no purchase of new cigarette or tobacco product inventory during the month.
 - (2) A 10-day suspension for a first offense for a seizure of less than 20 packages of cigarettes, or the equivalent amount of tobacco products based on wholesale cost.
 - (3) A 20-day suspension for a first offense for a seizure of 20 packages of cigarettes or more, or the equivalent amount of tobacco products based on wholesale cost.
 - (4) Both a 30-day suspension or revocation and a fine for a second or subsequent offense. The fine will be determined in accordance with section 46070.

- (e) In cases involving multiple violations, the violation punishable by the most severe penalty will be used for purposes of determining the penalty assessed.
- (f) Notwithstanding subdivisions (b) through (e) above, a reduction in the length of a suspension period may be warranted if mitigating circumstances are present, as set forth in Regulation 46060. If a suspension period is reduced, the redetermined period of suspension shall be 0 days, 10 days, or 20 days. The existence of mitigating circumstances may also warrant reducing a revocation penalty to a 30-day suspension, unless revocation is mandated pursuant to Business and Professions Code section 22974.4, 22978.6, or 22980.3, subdivision (a)(2).

Note: Authority: Business and Professions Code section 22971.2.

Reference: Business and Professions Code sections 22974.7, 22977, subdivision (a)(5), 22978.1, 22978.2, 22978.7, 22978.5, subdivision (b), 22979.7, 22980, subdivision (b), 22980.1, subdivisions (b), (c), (d), (e), (f), (g), 22980.2, subdivision (a).

Regulation 46050. PENALTIES FOR LICENSED OR UNLICENSED MANUFACTURERS AND IMPORTERS.

The following penalties shall be assessed in addition to any other civil or criminal penalty provided by law upon a finding that a manufacturer or importer has violated any provision of the Act:

- (a) A first offense of a violation of any of the following provisions will result in the issuance of a Warning Notice to the licensee or unlicensed person:
 - (1) Business and Professions Code section 22979.4 (importer's failure to retain purchase invoices on premises).
 - (2) Business and Professions Code section 22979, subdivision (b)(1) (participating manufacturer's false statement on certification to the Board).
 - (3) Business and Professions Code section 22979.5, subdivision (b) (manufacturer's or importer's failure to retain sales records on premises).
 - (4) Business and Professions Code section 22980.1, subdivision (a), (e) or (f) (purchases or sales from or to an unlicensed person or person with suspended or revoked license).
 - (5) Business and Professions Code section 22980.2, subdivision (a) (sales of cigarettes or tobacco products by unlicensed person or person with suspended or revoked license).

- (6) Business and Professions Code section 22979.6, subdivision (c) (manufacturer's or importer's failure to comply with invoice requirements).
- (b) A first offense of a violation of Business and Professions Code section 22980.1, subdivision (g) (purchase of cigarettes to which a stamp may not be affixed in accordance with Rev. & Tax. Code, § 30163, subd. (b)) shall result in a 20-day suspension.
- (c) A second or subsequent offense for a violation of the provisions listed in subdivision (a) or (b) above shall result in both a 30-day suspension or revocation and a fine.
- (d) In cases involving multiple violations, the violation punishable by the most severe penalty will be used for purposes of determining the penalty assessed.
- (e) Notwithstanding subdivisions (b) through (d) above, a reduction in the length of a suspension period may be warranted if mitigating circumstances are present, as set forth in Regulation 46060. If a suspension period is reduced, the redetermined period of suspension shall be 0 days, 10 days, or 20 days. The existence of mitigating circumstances may also warrant reducing a revocation penalty to a 30-day suspension, unless revocation is mandated pursuant to Business and Professions Code section 22974.4, 22978.6, or 22980.3, subdivision (a)(2).

Note: Authority: Business and Professions Code section 22971.2.

Reference: Business and Professions Code sections 22974.7, 22978.7, 22979.4, 22979, subdivision (b)(1), 22979.5, subdivision (b), 22979.7, 22980.1, subdivisions (a), (e), (f), 22980.2, subdivision (a), 22979.6, subdivision (c).

Regulation 46060. MITIGATING CIRCUMSTANCES.

Factors including, but not limited to, the following may be considered for purposes of determining whether mitigating circumstances exist pursuant to Regulations 46030, 46040 and 46050:

- (a) How recently the licensee purchased the business or began operations and acquired inventory of cigarettes and/or tobacco.
- (b) The amount of cigarettes without tax stamps and with counterfeit tax stamps in relation to the size of the licensee's overall inventory.
- (c) The size of the licensee's cigarette and/or tobacco product business.

(d) The retail value of any cigarettes or tobacco products seized.

(e) An absence of prior seizures.

Note: Authority: Business and Professions Code section 22971.2.

Reference: Business and Professions Code sections 22974.7, 22978.7, 22979.7.

Regulation 46070. DETERMINATION OF FINE.

(a) The fine for Business and Professions Code section 22974.5 (retailer's failure to display a license) is \$500.

(b) The fine for all other violations of the Act shall be determined as follows:

(1) Any second or subsequent offense of a violation of any of the following provisions shall result in a fine of \$1,000:

(A) Business and Professions Code section 22973, subdivision (a)(5) (retailer's false statement on application).

(B) Business and Professions Code section 22977, subdivision (a)(5) (distributor's or wholesaler's false statement on application).

(C) Business and Professions Code section 22979, subdivision (b)(1) (participating manufacturer's false statement on certification to the Board).

(2) A second offense of a violation of any of the following provisions shall result in a \$1,000 fine, and each subsequent offense shall increase the fine by an increment of \$1,000, up to a maximum fine of \$5,000:

(A) Business and Professions Code section 22974 (retailer's failure to retain purchase invoices).

(B) Business and Professions Code section 22974.3, subdivision (b) (retailer's sale or possession of untaxed tobacco products).

(C) Business and Professions Code section 22978.1 (distributor's or wholesaler's failure to retain purchase invoices).

(D) Business and Professions Code section 22978.2, subdivision (b) (distributor's or wholesaler's sale or possession of untaxed tobacco products).

- (E) Business and Professions Code section 22978.4, subdivision (c) (distributor's or wholesaler's failure to comply with invoice requirements).
 - (F) Business and Professions Code section 22978.5, subdivision (b) (distributor's or wholesaler's failure to retain sales records).
 - (G) Business and Professions Code section 22979.4 (importer's failure to retain purchase invoices on premises).
 - (H) Business and Professions Code section 22979.5, subdivision (b) (manufacturer's or importer's failure to retain sales records on premises).
 - (I) Business and Professions Code section 22979.6, subdivision (c) (manufacturer's or importer's failure to comply with invoice requirements).
 - (J) Business and Professions Code section 22980, subdivision (b) (any person's refusal to allow inspection).
 - (K) Business and Professions Code sections 22980.1, subdivisions (a), (b), (c), (d), (e), (f), and (g) (sales or purchases of cigarettes or tobacco products to or from an unlicensed person or person with suspended or revoked license).
 - (L) Business and Professions Code section 22980.2, subdivision (a) (sales of cigarettes or tobacco products by unlicensed person or person with suspended or revoked license).
- (3) A second offense of any of the following provisions shall result in a \$2,000 fine, and each subsequent offense shall increase the fine by \$1,000, up to a maximum of \$5,000 per offense:
- (A) Business and Professions Code section 22974.3, subdivision (a)(2) (second seizure from retailer within five years of less than 20 packs of untaxed cigarettes).
 - (B) Business and Professions Code section 22978.2, subdivision (a)(2) (second seizure from a distributor or wholesaler within five years of less than 20 packs of untaxed cigarettes).
- (4) A second offense of any of the following provisions shall result in a fine of \$5,000 or five times the retail value of any cigarettes or tobacco products seized, whichever is greater, and the \$5,000 fine shall be

increased to \$10,000 for the third offense, \$15,000 for the fourth offense, \$20,000 for the fifth offense, and \$50,000 for the sixth and subsequent offenses:

(A) Business and Professions Code section 22974.3, subdivision (a)(4) (second seizure within five years from retailer or any other person of 20 or more packs of untaxed cigarettes).

(B) Business and Professions Code section 22978.2, subdivision (a)(4) (second seizure within five years from a distributor or wholesaler of 20 or more packs of untaxed cigarettes).

(5) Fines are reduced by the amount of any fine imposed as a result of a misdemeanor citation issued for the same violation of the Act.

Note: Authority: Business and Professions Code section 22971.2.

Reference: Business and Professions Code sections 22973, subdivision (5), 22974, 22974.3, subdivision (a), 22974.3, subdivision (b), 22974.7, 22977, subdivision (a)(5), 22978.1, 22978.2, subdivision (a), 22978.2, subdivision (b), 22978.4, subdivision (c), 22978.5, subdivision (b), 22978.7, 22979, subdivision (b)(1), 22979.4, 22979.5, subdivision (b), 22979.6, subdivision (c), 22979.7, 22980, subdivision (b), 22980.1, subdivisions (a)-(g), 22980.2, subdivision (a).

Regulation 46080. COLLECTION OF FINES.

The Board shall collect fees, fines and penalties in compliance with Revenue and Taxation Code, division 2, part 30, chapter 4, commencing with section 55121.

Note: Authority: Business and Professions Code section 22971.2.

Reference: Business and Professions Code sections 22974.7, 22978.7, 22979.7; Revenue and Taxation Code section 55121 et seq.

Article 5: APPEAL PROCEDURES

Regulation 46090. RIGHT TO APPEAL.

(a) Every licensee or unlicensed person has the right to appeal any violation of the Act, and may appeal a Warning Notice or Notice of Violation issued by the Excise Taxes and Fees Division, as specified below:

(1) If the Notice of Violation contains a penalty of revocation and/or a fine of more than \$2,500, the Notice of Violation may be appealed as follows:

- (A) The first appeal shall be to the Excise Taxes and Fees Division;
 - (B) If the licensee or unlicensed person disagrees with the Notice of First Decision issued by the Excise Taxes and Fees Division, the licensee or unlicensed person may make a second appeal to the Appeals Division; and
 - (C) If the licensee or unlicensed person disagrees with the Notice of Second Decision issued by the Appeals Division, the licensee or unlicensed person may make a third appeal to the Board for a final decision.
- (2) If the Notice of Violation or Warning Notice does not contain a penalty of revocation or a fine of more than \$2,500, the Notice of Violation or Warning Notice may be appealed as follows:
- (A) The first appeal shall be to the Excise Taxes and Fees Division; and
 - (B) If the licensee or unlicensed person disagrees with the Notice of First Decision issued by the Excise Taxes and Fees Division, the licensee or unlicensed person may make a second appeal to the Appeals Division for a final decision.
- (b) If a timely appeal is made, a conference and/or hearing will be scheduled to allow the licensee or unlicensed person requesting an appeal an opportunity to contest the violation(s) and show cause why the penalties should not apply or should be reduced.
- (c) Burden of Proof. The licensee or unlicensed person shall have the burden of proof as to the grounds for dismissal of any violations or for the reduction of penalties.

Note: Authority: Business and Professions Code section 22971.2.

Reference: Business and Professions Code sections 22974.7, 22978.7, 22979.7.

Regulation 47000. APPEAL - EXCISE TAXES AND FEES DIVISION.

- (a) Time For Filing. A written Request for Appeal must be filed within 10 days of the date the Warning Notice or Notice of Violation was mailed to or personally delivered to the licensee or unlicensed person.
- (b) Failure to File a Timely Appeal. If a written Request for Appeal is not filed within the 10-day period, the licensee or unlicensed person shall be deemed to

have waived his or her right to an appeal and the Warning Notice or Notice of Violation, and the penalty or penalties stated therein, shall become final.

- (c) Request for an Excise Taxes and Fees Division Appeal. The Request for Appeal shall state the specific grounds upon which the licensee or unlicensed person is contesting the Warning Notice or Notice of Violation and shall be accompanied by any and all documentation and written argument to be considered in support of the appeal. The Request for Appeal shall be signed by the licensee or unlicensed person or by an authorized representative.
- (d) Notice of Conference. After receiving a timely Request for Appeal the Excise Taxes and Fees Division will schedule a conference and send a Notice of Conference stating the date and time of the scheduled conference to the licensee or unlicensed person. The Notice of Conference shall be sent to the licensee or unlicensed person at least 15 days prior to the date of the scheduled conference.
- (e) Conference. The conference is intended to be an informal, non-adversarial proceeding with a discussion of the relevant facts and applicable laws and regulations. Written statements made under penalty of perjury may be submitted, but subpoenas are not issued for conferences, nor is sworn testimony required. The conference will be conducted by telephone and shall not be recorded and/or transcribed by the Excise Taxes and Fees Division. The conference may be recorded and/or transcribed by the licensee or unlicensed person, but only if the licensee or unlicensed person agrees to provide a copy of the recording or transcript to the Excise Taxes and Fees Division.
- (f) The Excise Taxes and Fees Division may grant one request to reschedule or postpone a conference. If a request is granted, the conference shall be rescheduled or postponed so that it can be held within 15 days of the date the conference was scheduled to be held prior to the granting of the request, unless the Chief of the Excise Taxes and Fees Division or his or her designee approves of a later date.
- (g) During a conference, the Excise Taxes and Fees Division may grant a request for additional time to submit additional evidence. If additional time is granted, the evidence shall be submitted to the Excise Taxes and Fees Division no later than 7 days after the conference date.
- (h) Decision. Following the conference, the Excise Taxes and Fees Division shall issue a Notice of First Decision. The Notice of First Decision will set forth the Excise Taxes and Fees Division's decision, the applicable penalty or penalties, and the licensee's or unlicensed person's appeal rights.

- (i) A licensee or unlicensed person who receives a Notice of First Decision may appeal the decision within 10 days of the date the Notice of First Decision was mailed or personally delivered to the licensee or unlicensed person by timely filing a Request for Appeals Conference with the Board Proceedings Division.
- (j) Failure to File a Timely Appeal. If a Request for Appeals Conference is not filed within the 10-day period provided in subdivision (i), then the licensee or unlicensed person shall be deemed to have waived his or her right to an appeal and the Notice of First Decision, and the penalty or penalties stated therein, shall become final.

Note: Authority: Business and Professions Code section 22971.2.

Reference: Business and Professions Code sections 22974.7, 22978.7, 22979.7.

Regulation 47010. APPEAL - APPEALS DIVISION.

- (a) Request for Appeals Conference. The Request for Appeals Conference shall state the specific grounds upon which the licensee or unlicensed person is contesting the Warning Notice, Notice of Violation, or Notice of First Decision, and shall be accompanied by any and all documentation and written argument to be considered in the appeal. The Request for Appeals Conference shall be signed by the licensee or unlicensed person or by an authorized representative.
- (b) Conference. Upon receipt of a Request for Appeals Conference, a conference will be scheduled and held as set forth in Regulation 5023 [NOTE: reference to change when new Rules of Practice are adopted], unless otherwise provided herein. The conference shall allow a licensee or unlicensed person an opportunity to show cause why the Warning Notice, Notice of Violation, or Notice of First Decision, and the penalty or penalties imposed therein, should not be upheld.
 - (1) The conference will be held by telephone and shall be recorded by the Appeals Division. A licensee or unlicensed person may request a copy or transcript of the recording, at his or her expense.
 - (2) The Appeals Division may grant a request to reschedule or postpone a conference. If a request is granted, the conference shall be rescheduled or postponed so that it can be held within 15 days of the date the conference was scheduled to be held prior to the granting of the request, unless the Chief Counsel or his or her designee approves of a later date.
 - (3) During a conference, the Appeals Division may grant a request for additional time to submit additional evidence. If such additional time

is granted, the evidence shall be submitted to the Appeals Division no later than 7 days after the conference date.

- (c) Decision. The Appeals Division shall issue a Notice of Second Decision following the conference. The Notice of Second Decision will set forth the Appeals Division's decision, the applicable penalty or penalties, and the licensee's or unlicensed person's appeal rights, if any, as set forth in subdivision (f) below.
- (d) No later than 35 days after the Notice of Second Decision is issued, the Appeals Division may, in its sole discretion, issue a Notice of Second Decision – Reconsideration to correct any mistakes of law and/or facts.
- (e) A Notice of Second Decision or Notice of Second Decision – Reconsideration that upholds a penalty of revocation and/or a fine of more than \$2,500 may be appealed by timely filing a Request for Board Hearing. A Notice of Second Decision or Notice of Second Decision – Reconsideration that upholds a penalty of suspension and/or a fine of \$2,500 or less is final and may not be appealed further.
- (f) Failure to File. When applicable, a Request for Board Hearing must be filed within 10 days of the date the Notice of Second Decision is mailed or personally delivered to the licensee or unlicensed person. If a Request for a Board Hearing is not filed within the 10-day period, then the licensee or unlicensed person shall be deemed to have waived his or her right to an appeal and the Notice of Second Decision, and the penalty or penalties stated therein, shall become final. If a hearing is not requested or is waived, then official notice of the Board's action on the appeal will be mailed to the licensee or unlicensed person.

Note: Authority: Business and Professions Code section 22971.2.

Reference: Business and Professions Code sections 22974.7, 22978.7, 22979.7.

Regulation 47020. APPEAL – BOARD HEARING.

- (a) Request for Board Hearing. The Request for Board Hearing shall:
 - (1) State the specific grounds upon which the licensee or unlicensed person is contesting the Notice of Violation or Notice of Second Decision;
 - (2) State whether an oral hearing is requested;

- (3) Be accompanied by any and all documentation and written argument to be considered in support of the licensee's or unlicensed person's contentions; and
 - (4) Be signed by the licensee or unlicensed person or by an authorized representative.
- (b) When applicable, upon receipt of the Request for Board Hearing, a Board hearing shall be scheduled and conducted in accordance with the procedures as set forth in Regulations 5070, 5072 through 5075, 5076, 5077 through 5082, and 5083 through 5087 [NOTE: reference to change when new Rules of Practice are adopted], to allow the licensee or unlicensed person an opportunity to show cause why the Notice of Violation or Notice of Second Decision, and the penalty or penalties imposed therein, should not be upheld. Following the Board hearing, a Notice of Board Decision will be mailed to the licensee or unlicensed person.

Note: Authority: Business and Professions Code section 22971.2.

Reference: Business and Professions Code sections 22974.7, 22978.7, 22979.7.

Article 6: SEIZURES

Regulation 47030. FORFEITURE.

- (a) Any cigarettes or tobacco products seized by the Investigations Division or seized and delivered to the Board by a law enforcement agency shall be deemed forfeited to the state pursuant to the provisions of one or more of the following: Business and Professions Code section 22974.3, subdivision (a), Business and Professions Code section 22974.3, subdivision (b), Business and Professions Code section 22978.2, subdivision (a), or Business and Professions Code section 22978.2, subdivision (b). In effecting such forfeitures, the Board shall comply with the procedures set forth in Revenue and Taxation Code, division 2, part 13, chapter 7.5, commencing with section 30435.
- (b) The Board shall not return seized cigarettes or tobacco products to the party from whom they were seized and who is petitioning for their recovery under Revenue and Taxation Code section 30438 unless the Board finds that such cigarettes or tobacco products were erroneously or illegally seized. Therefore, to obtain the recovery of seized cigarettes or tobacco products under a petition for recovery filed under Revenue and Taxation Code section 30438, the

petitioner must prove by a preponderance of the evidence that the seized cigarettes or tobacco products were erroneously or illegally seized. Depending upon the circumstances, evidence that may be found to be relevant to the issue of whether or not the cigarettes or tobacco products were erroneously or illegally seized includes the following:

- (1) Evidence that, at the time of seizure, the cigarettes had valid California tax stamps affixed and the petitioner was not operating with a suspended or revoked license.
- (2) Evidence that, at the time of seizure, the cigarettes were located at a licensed cigarette distributor's facility.
- (3) Evidence that, at the time of seizure, the cigarettes were not listed on the Attorney General's California Tobacco Directory.
- (4) Evidence that, at the time of seizure, tax was paid for the tobacco products seized or the tobacco products were located at a licensed tobacco products distributor's facility.

Note: Authority: Section 22971.2, Business and Professions Code.

Reference: Business and Professions Code sections 22974.3, subdivisions (a) and (b), 22978.2, subdivisions (a) and (b), and 22980.2, subdivision (c); Revenue and Taxation Code sections 30435 and 30438.